United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

APRIL TERM, 1909.

No. 1995. 632

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CHARLES F. MASON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MARCH 12, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1909.

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THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CHARLES F. MASON.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 13, 1909.

In the Court of Appeals of the District of Columbia.

No. 1995.

THE UNITED STATES OF AMERICA, Appellant,
vs.
CHARLES F. MASON.

a Supreme Court of the District of Columbia.

No. 47813. At Law.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
CHARLES F. MASON, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

1 *Amended Declaration.*

Filed June 12, 1907.

In the Supreme Court of the District of Columbia.

No. 47813. At Law.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
CHARLES F. MASON, Defendant.

Now comes the plaintiff, and with leave of the court first had and obtained, amends its declaration so that it will read as follows:

1. The plaintiff sues the defendant for money payable by the defendant to the plaintiff for that, heretofore, to wit, on the first day of September, 1889, the defendant, being at that time an Assistant Surgeon in the Army of the plaintiff, made and presented to the plaintiff a claim for the sum of one hundred and fifty dollars,

being the alleged value of a horse the private property belonging to the defendant, which the defendant alleged was lost by him on the 15th day of April, 1889, at Fort Washakie in the State of Wyoming, while the defendant was in the military service of the plaintiff and without fault or negligence on the part of the defendant.

That on the 26th day of January, 1897, the Auditor for the War Department of the plaintiff settled the said claim of the defendant, and allowed to him the said sum of one hundred and fifty dollars, and certified the said balance to the Division of Bookkeeping and Warrants of the Treasury Department; that the Secretary of the Treasury thereupon issued his warrant to the Treasurer of
2 the plaintiff directing him to pay said balance, and on to wit the third day of February, 1897, the said warrant was countersigned by said Treasurer and delivered to the defendant, and was duly paid.

That within a year from the date of said settlement, on to wit, the twenty-eighth day of May, 1897, the Comptroller of the Treasury, as by law he might, upon his own motion revised the said settlement, and decided that the loss of the said horse was not due to any exigency or necessity of the military service of the plaintiff, that such loss did not occur in the military service of the plaintiff, and that such loss was not without fault or negligence on the part of the defendant, and the said Comptroller therefore disallowed the amount allowed by the Auditor as aforesaid, and certified to the said Auditor the difference so ascertained by him in said revision.

That on the twenty-fifth day of May, 1898, the Auditor for the War Department stated on account of the said difference so ascertained by the Comptroller of the Treasury, and found a balance to be due to the plaintiff from the defendant of one hundred and fifty dollars, and the said Auditor duly certified said account to the Division of Bookkeeping and Warrants of the Treasury Department.

Whereby the defendant became and was indebted to the plaintiff in said sum of one hundred and fifty dollars, and being so indebted he promised and undertook to pay to the plaintiff the sum of one hundred and fifty dollars; yet the defendant, though often requested so to do, has not paid the same nor any part thereof, but has
3 wholly failed and refused and still does fail and refuse so to do.

And the plaintiff claims the sum of one hundred and fifty dollars, with interest from the third day of February, 1897, together with costs of suit.

2. The plaintiff sues the defendant for other money payable by the defendant to the plaintiff for that, heretofore, to wit, on the first day of September, 1889, the defendant, being at that time an Assistant Surgeon in the Army of the plaintiff, made and presented to the plaintiff a claim for the sum of one hundred and fifty dollars, being the alleged value of a horse the private property belonging to the defendant which the defendant alleged was lost by him on the fifteenth day of April, 1889, at Fort Washakie in the State of Wyoming, while the defendant was in the military service of the plaintiff and without fault or negligence on the part of defendant.

That on the twenty-sixth day of January, 1897, the Auditor for the War Department of the plaintiff settled the said claim of the defendant, and allowed to him the said sum of one hundred and fifty dollars, and certified the said balance to the Division of Bookkeeping and Warrants of the Treasury Department; that the Secretary of the Treasury thereupon issued his warrant to the Treasurer of the plaintiff directing him to pay said balance and on to wit the third day of February, 1897, the said draft was countersigned by the said Treasurer and delivered to the defendant, and was duly paid.

And the plaintiff says that the said payment of said sum
4 of one hundred and fifty dollars to the defendant was made by mistake, in this, that the said alleged loss by the defendant of said horse did not come within the provisions of the act of Congress approved March 3, 1885, and entitled, "An Act to provide for the settlement of the claims of officers and enlisted men of the Army for loss of private property destroyed in the military service of the United States," in this, that the loss of the said horse was not due to any exigency or necessity of the military service of the plaintiff, and did not occur in the military service of the plaintiff, and that said loss was not without the fault or negligence on the part of the defendant, and that the said horse was not of the value of one hundred and fifty dollars but was of a much less value.

That within a year from the date of said settlement, on, to wit, the twenty-eight day of May, 1897, the Comptroller of the Treasury of his own motion, by authority granted under section eight of the act of Congress approved July 31, 1894, entitled "An act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending June thirtieth, 1895, and for other purposes," revised the said settlement and decided that the same was erroneous for the reasons in this count stated, and the said Comptroller disallowed the amount allowed by the Auditor as aforesaid, and certified to the said Auditor the difference so ascertained by him in said revision.

5 That on the twenty fifth day of May, 1898, the Auditor for the War Department stated an account of the said difference so ascertained by the Comptroller of the Treasury, and found a balance to be due to the plaintiff from the defendant of one hundred and fifty dollars, and the said Auditor duly certified the said account to the Division of Bookkeeping and Warrants of the Treasury Department.

Whereby the defendant became and was indebted to the plaintiff in the sum of one hundred and fifty dollars, and being so indebted he promised and undertook to pay to the plaintiff the sum of one hundred and fifty dollars; yet the defendant, though often requested so to do, has not paid the same nor any part thereof, but has wholly failed and refused and still does fail and refuse so to do.

And the plaintiff claims the sum of one hundred and fifty dollars, with interest from the third day of February, 1897, together with costs of suit.

3. The plaintiff sues the defendant for other money payable by the defendant to the plaintiff for that, heretofore, to wit, on the first

day of September, 1889, the defendant, being at that time an assistant Surgeon in the Army of the plaintiff, made and presented to the plaintiff a claim for the sum of one hundred and fifty dollars, being the alleged value of a horse the private property belonging to the defendant which the defendant alleged was lost by him on the fifteenth day of April, 1889, at Fort Washakie in the State of Wyoming, while the defendant was in the military service of the plaintiff and without fault or negligence on the part of the defendant.

6 That on the twenty-sixth day of January, 1897, the Auditor for the War Department of the plaintiff settled the said claim of the defendant, and allowed him the said sum of one hundred and fifty dollars, and certified the said balance to the Division of Bookkeeping and Warrants of the Treasury Department; that the Secretary of the Treasury thereupon issued his warrant to the Treasurer of the plaintiff directing him to pay said balance, and on to wit the third day of February, 1897, the said draft was countersigned by the said Treasurer and delivered to the defendant, and was duly paid.

And the plaintiff says that the loss of the said horse was not due to any exigency or necessity of the military service of the United States, and did not occur in the military service of the United States, and that the said loss was not without fault or negligence on the part of the defendant, and that the said horse was not of the value of one hundred and fifty dollars, but was of a much less value, and that the loss by the defendant of the said horse did not come within the provisions of the Act of Congress approved March 3, 1885, and entitled, "An Act to Provide for the Settlement of the Claims of Officers and Enlisted Men of the Army for loss of Private Property Destroyed in the Military Service of the United States," and that the said payment of said sum of one hundred and fifty dollars to the defendant was made by mistake of fact.

That within a year from the date of said settlement, on, to wit, the twenty-eighth day of May, 1897, the Comptroller of the

7 Treasury of his own motion, by authority granted under section eight of the Act of Congress approved July 31, 1894, and entitled, "An Act Making Appropriations for the Legislative, Executive and Judicial Expenses of the Government for the Fiscal Year ending June thirtieth, 1895, and for Other Purposes," revised the said settlement and decided that the same was erroneous for the reasons in this count stated, and the said Comptroller disallowed the amount allowed by the Auditor as aforesaid, and certified to the said Auditor the difference so ascertained by him in said revision.

That on the twenty-fifth day of May, 1898, the Auditor for the War Department stated an account of the said difference so ascertained by the Comptroller of the Treasury, and found a balance to be due to the plaintiff from the defendant of one hundred and fifty dollars, and the said Auditor duly certified the said account to the Division of Bookkeeping and Warrants of the Treasury Department.

Whereby the defendant became and was indebted to the plaintiff

in the sum of one hundred and fifty dollars, and being so indebted he promised and undertook to pay to the plaintiff the sum of one hundred and fifty dollars; yet the defendant, though often requested so to do, has not paid the same nor any part thereof, but has wholly failed and refused and still does fail and refuse so to do.

And the plaintiff claims the sum of one hundred and fifty dollars, with interest from the third day of February, 1897, together with costs of suit.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

8 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

DANIEL W. BAKER.

9 *Demurrer.*

Filed June 12, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 47813.

THE UNITED STATES
vs.
CHARLES F. MASON.

The defendant by his attorney says that the plaintiff's declaration is bad in substance and does not set forth any cause of action.

1. The Auditor for the War Department settled the claim of the defendant, and allowed to him the sum of one hundred and fifty dollars, the value of said defendant's horse, which amount was duly paid to and accepted by the defendant in full settlement of said claim. The settlement so made cannot, under the terms of the Act of March 3, 1885, now be reopened or considered there being no allegation that such settlement was obtained by the fraud of this defendant.

2. The statement of the plaintiff that the payment of the claim of defendant was made by mistake of fact is not supported by any specific allegation of any mistake of fact or facts, but are essentially statements of differences of opinion between the Comptroller and the Auditor for the War Department, and do not afford grounds for reopening this claim.

LEWIS W. CALL,
Attorney for Defendant.

10 Supreme Court of the District of Columbia.

THURSDAY, *January* 23, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 47813.

THE UNITED STATES, Pl't'f,
vs.
CHARLES F. MASON, Def't.

Upon hearing the defendant's demurrer to the plaintiff's amended declaration, it is considered that said demurrer be and the same is hereby sustained with leave to the plaintiff to amend its declaration as it may be advised within ten days.

Amended Declaration.

Filed February 12, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 47813.

UNITED STATES OF AMERICA
vs.
CHARLES F. MASON.

Now comes the plaintiff and with leave of Court first had and obtained, amends its declaration, by adding thereto a count as follows:

4. The plaintiff sues the defendant for other money payable by the defendant to the plaintiff for that, heretofore, to wit, on
11 the first day of September, 1889, the defendant, being at that time an Assistant Surgeon in the army of the plaintiff, made and presented to the plaintiff a claim for the sum of one hundred and fifty dollars, being the alleged value of a horse, the private property belonging to the defendant which the defendant alleged was lost by him on the fifteenth day of April, 1889, at Fort Washakie, in the state of Wyoming, while the defendant was in the military service of the plaintiff and without fault or negligence on the part of the defendant.

That on the 26th day of January, 1897, the Auditor for the War Department of the plaintiff found as a matter of fact that the said horse was in the custody of a keeper, a soldier of the United States, and became frightened and broke away from said keeper and fell and was killed, and that the said horse was of the value of one hundred and fifty dollars, and found as matter of law that the said

horse was lost in the military service of the said United States, and that the said horse was lost without fault or negligence on the part of the defendant, and settled the said claim of the defendant, and allowed him the said sum of one hundred and fifty dollars, and certified the said balance to the Division of Bookkeeping and Warrants of the Treasury Department; that the Secretary of the Treasury thereupon issued his warrant to the Treasurer of the plaintiff directing him to pay said balance and on, to wit, the third day of February, 1897, the said draft was countersigned by the said Treasurer and delivered to the defendant, and was duly paid.

12 And the plaintiff says that as matter of fact the said horse had been used by its owner the defendant and then entrusted to a private soldier of the United States to be returned to the stable, and that it was not the duty of the said soldier as a soldier to take the said horse to the stable, and that the said horse became frightened and broke away from the said soldier and was killed, and that the said horse was only worth the sum of one hundred dollars, and that as matter of law the said horse was not lost in the military service of the plaintiff, or under any exigency or necessity of said service, and was not lost without fault or negligence on the part of the defendant, and that the defendant was guilty of negligence in entrusting the said horse to the said soldier, and that the said Auditor was mistaken in fact when he found the said horse was of the value of one hundred and fifty dollars and was mistaken in law when he found the said horse was lost in the military service of the said United States and without fault or negligence on the part of the defendant.

And the plaintiff says that the payment of the said sum of one hundred and fifty dollars to the defendant, was made because of said mistake of fact and of law so made by said Auditor in finding said horse was of the value of one hundred and fifty dollars, and that it was lost in the military service of the plaintiff without fault or negligence on the part of the defendant.

13 That within a year from the date of said settlement on, to wit, the twenty eighth day of May, 1897, the Comptroller of the Treasury of his own motion by authority granted under section eight of the act of Congress approved July 31, 1894, entitled "An act making appropriations for the legislative, executive and judicial expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes," revised the said settlement and decided the same was erroneous because the same had been made by said Auditor under a mistake of fact and of law as in this count set forth, and that the said Comptroller disallowed the amount allowed by the Auditor as aforesaid and certified to the said Auditor the difference so ascertained by him in said revision.

That on the twenty fifth day of May, 1898, the Auditor for the War Department stated an account of the said difference so ascertained by the Comptroller of the Treasury, and found a balance to be due the plaintiff from the defendant of one hundred and fifty dollars, and the said Auditor duly certified the said account to the Division of Bookkeeping and Warrants of the Treasury Department.

Whereby the defendant became and was indebted to the plaintiff in the sum of one hundred and fifty dollars, and being so indebted he promised and undertook to pay to the plaintiff the sum of one hundred and fifty dollars; yet the defendant, though often requested so to do, has not paid the said sum nor any part thereof, but has wholly failed and refused and still does fail and refuse so to do.

14 And the plaintiff claims the sum of one hundred and fifty dollars, with interest from the third day of February, 1897, together with the costs of suit.

DANIEL W. BAKER,
Attorney for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the date of service hereof, otherwise judgment.

DANIEL W. BAKER,
Attorney for Plaintiff.

Demurrer to Amended Declaration.

Filed February 15, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 47813.

THE UNITED STATES
v.
CHARLES F. MASON.

The defendant by his attorneys says that the plaintiff's declaration is bad in substance and does not set forth any cause of action.

15 1. The Auditor for the War Department settled the claim of the defendant, and allowed to him the sum of one hundred and fifty dollars, the value of said defendant's horse, which amount was duly paid to and accepted by the defendant in full settlement of said claim. The settlement so made can not, under the terms of the Act of March 3, 1885, now be reopened or considered, there being no allegation that such settlement was obtained by the fraud of this defendant.

2. The statement of the plaintiff that the payment of the claim of defendant was made by mistake of fact is not supported by any specific allegation of any mistake of fact or facts, but are essentially statements of differences of opinion between the Comptroller and the Auditor for the War Department and of erroneous findings as to facts and law by the Auditor; and do not afford grounds for re-opening the settlement.

LEWIS W. CALL,
Attorney for Defendant.

16 Supreme Court of the District of Columbia.

MONDAY, *February 15th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

No. 47813. At Law.

UNITED STATES OF AMERICA, Pl'ff,
vs.
CHARLES F. MASON, Defendant.

Now comes on for hearing the demurrer filed herein this day, to the fourth count of plaintiff's amended declaration filed herein February 12th, 1908, and being submitted to the court, it is upon consideration thereof ordered that said demurrer be, and the same is hereby sustained. Thereupon, the plaintiff by its attorney elects to stand upon its said amended declaration, and the amended declaration filed herein June 12th, 1907. Wherefore, it is considered and adjudged that the plaintiff take nothing by this action, that the defendant go hereof without day, be for nothing held, and recover of plaintiff his costs of defense to be taxed by the Clerk and have execution thereof.

From the aforegoing the plaintiff by its attorney in open court, notes an appeal to the Court of Appeals.

17 *Directions to Clerk for Preparation of Transcript of Record.*

Filed February 15, 1909.

In the Supreme Court of the District of Columbia.

No. 47813. At Law.

UNITED STATES
vs.
CHARLES F. MASON.

In making up the record for the transcript on appeal in the above case, the Clerk will include the following:

1. Amended declaration filed June 12, 1907.
2. Demurrer thereto.
3. Order sustaining the demurrer.
4. Amended declaration filed February 12, 1908.
5. Demurrer thereto.
6. Order sustaining the demurrer and noting appeal.
7. This order.

DANIEL W. BAKER,
Attorney of the United States in and for the District of Columbia.

18 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 17 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47813 at Law, wherein The United States of America is Plaintiff and Charles F. Mason is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 5th day of March, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 1995. The United States of America, appellant, *vs.* Charles F. Mason. Court of Appeals, District of Columbia. Filed Mar. 12, 1909. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1909.

No. 1995.

UNITED STATES OF AMERICA, APPELLANT,

vs.

CHARLES F. MASON.

BRIEF FOR APPELLANT.

DANIEL W. BAKER,
United States Attorney.
JESSE C. ADKINS,
Special Assistant United States Attorney.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1909.

No. 1995.

UNITED STATES OF AMERICA, APPELLANT,

vs.

CHARLES F. MASON.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from an order sustaining a demurrer to a declaration (Rec., p. 9).

The declaration is in four counts, and seeks to recover the sum of $150 alleged to have been erroneously paid to the appellee, who was an assistant surgeon in the United States Army, as the value of a horse belonging to appellee, which he claimed was lost while he was in the military service of the United States.

The appellee made his claim under the act of March 3, 1885, entitled—

> "An Act to provide for the settlement of claims of officers and enlisted men of the Army for loss of private property destroyed in the military service of the United States (23 Stats., 350; 1 Comp. Stats., 172)."

So far as it is material to the present case, this act provides:

> "That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which has been, or may hereafter be, lost or destroyed in the military service, under the following circumstances:
>
> "First. When such loss or destruction was without fault or negligence on the part of the claimant. . . . *Provided*, that any claim which shall be presented and acted on under authority of this act shall be held as finally determined and and shall never thereafter be reopened or considered."

As appears from the declaration, the appellee on September 1, 1889, presented his claim for $150, being the alleged value of a horse belonging to him and claimed to have been lost April 15, 1889, at Fort Washakie, Wyoming, while appellee was in the military service of the United States, and without fault or negligence on his part (Rec., pp. 1, 2).

As a matter of fact, on the day of the fatality the appellee, after using his horse, had entrusted it to a private in the Army to be returned to the stable; and while in the latter's cusdody the horse became frightened, broke away and was killed (Rec., p. 7).

On January 26, 1897, the auditor for the War Department settled the claim, allowing it in full, and the sum of $150 was paid to appellee February 3, 1897. On May 28th following, the Comptroller of the Treasury, upon his own motion, revised this settlement and decided that the loss of the horse was not due to any exigency of the military service, did not occur in the military service, and was not without fault or negligence on the part of

appellee and the comptroller disallowed the claim. Thereupon the auditor for the War Department restated the account and found to be due from the appellee the sum theretofore paid him (Rec., p. 2).

The present suit is upon the implied promise to pay the sum thus found to be due to the United States. The first count alleges simply the presenting of the claim, its allowance and payment by the auditor, the revision by the comptroller and the restatement by the auditor, and is based upon the proposition that the comptroller's decision is conclusive of the question.

The other counts allege that the loss of the horse was not due to any exigency of the military service, and did not occur in the military service, and was not without the fault or negligence of the claimant, and that the horse was worth less than the sum of $150, and that the auditor was mistaken in fact and in law when he allowed the claim; and these counts seek to recover back the money paid out by this mistake.

Assignment of Errors.

The court below erred:

1. In sustaining the demurrer to the declaration.

2. In not holding that the action of the comptroller in deciding that the claim should not be allowed was final and conclusive.

3. In holding that the Government could not recover back the money paid out by its officers by mistake.

ARGUMENT.

The argument divides itself into two propositions:

I. That under the law the decision of the comptroller was conclusive of the case.

II. That even if the question is open, the comptroller's decision was correct and the Government is entitled to recover its money paid to one who was not entitled to receive it.

I.

Under the Statute Upon Which the Appellee's Claim was Based, the Decision of the Comptroller is Conclusive Upon Him.

This theory of the Government is covered by the first count. Before discussing the question it is but proper to call the court's attention to the fact that in two cases, practically identical with this, the Federal courts have sustained demurrers on declarations similar to this first count. One of these cases is United States *vs.* Olmsted, 106 Fed., 286, affirmed in 118 Fed., 433, and the other case is United States *vs.* Willcox, 118 Fed., 729.

In both of these cases the money was paid upon settlement of a claim by the auditor, and before the comptroller's revision, and the courts held that under the act of 1885, upon which the claims were based, the action of the auditor was final and the money could not be recovered in the absence of allegations showing a payment by mistake.

It would seem to necessarily follow from such a holding that the comptroller is absolutely without power in any case of this character, and has not the right to revise such claims even before payment has been made. That this is not true we think is made plain by a consideration of the provisions of the law relating to the accounting system of the Government as it stood in 1885, and at the time of the allowance of this claim.

The act of 1885 provides "that the proper accounting officers of the Treasury" shall examine the claims presented under it, and that any claim so presented and acted on shall be held as finally determined.

At the time of the passage of this act, "the proper accounting officers of the Treasury" to settle claims arising under it were the third auditor and the second comptroller.

Section 277, paragraph 3, R. S. U. S., provides:

> "The third auditor shall receive and examine all accounts relative to the subsistence of the Army, the quartermaster's department, and generally all accounts of the War Department other than those provided for; all accounts relating to pensions for the Army, and all accounts for compensation for the loss of horses and equipments of officers and enlisted men in the military service of the United States, and for the loss of horses and equipments, or of steamboats, and all other means of transportation, in the service of the United States by contract or impressment; and, after the examination of such accounts he shall certify the balances and shall transmit such accounts, with all the vouchers and papers and the certificate, to the second comptroller for his decision thereon."

Section 273, R. S. U. S., provides:

> "It shall be the duty of the second comptroller: First. To examine all accounts settled by the second, third, and fourth auditors, and certify the balances arising thereon to the secretary of the department in which the expenditure has been incurred."

Under section 277 of the Revised Statutes the third auditor had primary jurisdiction over the claims or accounts arising under the act of 1885, it being his duty to examine said claims and certify his action thereon to the second comptroller for the latter's action, and the latter's decision, being that of the proper accounting officer of the Treasury, became final under the provisions of the act of 1885.

The claim involved in this suit was not settled until 1897. In the meantime the accounting system of the Government had been radically changed. As appears from the statutes already quoted, a double audit was required in every account with the United States, the decision of an auditor requiring ratification by one of the comptrollers.

In 1894, for the purpose of avoiding this slow and costly double audit system, as far as possible, there was passed the so-called Dockery Act of July 31, 28 Stats., 211.

Section 4 of this act abolished the offices of the Second Comptroller and Commissioner of Customs, and provided:

> "The First Comptroller of the Treasury shall hereafter be known as Comptroller of the Treasury. He shall perform the same duties and have the same powers and responsibilities (except as modified by this act) as those now performed by or appertaining to the First and Second Comptrollers of the Treasury and the Commissioner of Customs; and all provisions of law not inconsistent with this act, in any way relating to them or either of them, shall hereafter be construed and held as relating to the Comptroller of the Treasury.

Section 3 of the act changes the designations of the different auditors so as to correspond with the names of the different departments of the Government. By virtue of this change the Third Auditor became the Auditor for the War Department. By paragraph 2 of section 7 of the act, the Auditor for the War Department was given jurisdiction over all accounts arising in and under the War Department. It thus became his duty to examine and settle claims arising under the act of 1885.

Section 8 of the act of 1894 (28 Stats., 207) provides:

> "The balances which may from time to time be certified by the auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-

> General, upon the settlements of public accounts, shall be final and conclusive upon the executive branch of the Government, *except* that any person whose accounts may have been settled, the head of any executive department, or of the board, commission, or establishment not under the jurisdiction of an executive department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury whose decision upon such revision shall be final and conclusive upon the executive branch of the Government: *Provided*, That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the reexamination of any account."

From section 8 it clearly appears that the action of the Auditor for the War Department is final and conclusive unless and only unless within a year from the date of the auditor's settlement the account shall be revised by the Comptroller of the Treasury upon the application of the claimant, the Secretary of War (in this particular case), the Secretary of the Treasury, or by the comptroller upon his own motion. Had the auditor's action been unsatisfactory to the claimant he would have had the right to demand a revision by the comptroller. The comptroller has the same right to revise on his own motion.

The action of the comptroller is in no sense a reopening of the settled account, because the decision of the auditor was only tentative and would not become final until the lapse of a year from the date of the said action.

The second paragraph of section 8 of the Dockery Act provides:

> "Upon a certificate by the Comptroller of the Treasury of any difference ascertained by him

> upon revision the auditor who shall have audited the account shall state an account of such differences, and certify it to the division of bookkeeping and warrants."

It will thus be seen that under the law as it stood in 1885 a claim like the one involved here was acted upon first by the third auditor; his conclusion was certified to the second comptroller, and had absolutely no weight in the decision of the case except as it might have a tendency to persuade the comptroller. The comptroller's decision was the one which was conclusive.

As the law stood at the time of the settlement of appellee's claim, the Auditor for the War Department had more power than had his predecessor, the third auditor. His decision upon a matter put it at rest unless the comptroller, set in motion in any of the ways provided by the statute, should revise his decision. When such revision was had, however, it was the auditor's duty to restate his account in accordance with the comptroller's conclusion, and when that was done the comptroller's decision, like that of the second comptroller under the old system, was conclusive of the question.

The fact that between the auditor's decision and the comptroller's revision the money which the auditor found to be due had been paid to the claimant had absolutely nothing to do with the case. To hold otherwise would mean that the comptroller's power of revision was absolutely at an end in any case where the money had been paid out through inadvertence or otherwise upon the auditor's decision. As a matter of fact, it is no exaggeration to say that thousands of accounts every year are revised by the comptroller where the money has already been paid to the claimant. Of course, in a great majority of these cases, the accounts are those of public officers, and it is a very simple matter to charge the debt thus

raised to the Government against that particular officer's next account. However, the principle is precisely the same. If the right exists in one case it exists in all.

The comptroller being, therefore, the accounting officer who makes the last decision in cases of this character, his decision is absolutely conclusive upon the point involved. The act of 1885 provides in terms:

> "That any claim which shall be presented and acted on under the authority of this act shall be *held as finally determined and shall never thereafter be reopened or considered.*"

Under the proper construction of this statute it seems to us plain beyond question that the final decision of the accounting officer is conclusive not only upon the Government itself, but upon the claimant.

That Congress had the power to so provide is beyond dispute. Payments made under the act of 1885 are clearly gratuitous, for the liability there recognized by the Government is purely a moral and not a legal one. Of course, Congress in making a gratuity has the right to give it under any terms which it may designate. In this case it has seen fit to say to any claimant who seeks to bring himself within the terms of the statute: "If you think that you should be compensated for the loss you have suffered, we will leave the decision of the matter to the auditor and the comptroller, and if they think your claim is well founded you will be paid; if they think your claim is ill founded that is an end of the matter, and the claim will not be considered in any other forum."

It is to be noted that section 8 of the act of 1894 above quoted makes the decision of the auditor where there is no appeal, and that of the comptroller upon revision, final "upon the executive branch of the Government." The same language was used in section 191, R.

S. U. S., in speaking of the decisions of the comptrollers under the old accounting system. It is plain, therefore, that in the ordinary accounts with the Government and claims under contracts made with it, the decision of the auditor or comptroller, as the case may be, is binding only upon the executive department, and the claimant is at liberty to bring his action in the Court of Claims. However, in the present statute Congress has said that when the claim is presented and acted upon under this authority the claim "shall be held as finally determined and shall never thereafter be reopened or considered." It would be difficult to find language more appropriate to be used as expressing the legislative intention that the decision of the comptroller should not be subject to review in the courts.

II.

The Comptroller's Decision is Correct, and the Government is Entitled to Recover the Money Which was Paid Out by Mistake.

It is recognized in the Olmsted and Willcox cases that if the declaration had shown that the payment had been made by mistake the Government would have been entitled to recover, if such averments were sustained by the proof.

There can be no question that the United States is entitled to recover moneys which have been paid out by its officers either through their mistake of fact or mistake of law.

The principle is definitely settled in the leading case of Wisconsin Central Railway Co. *vs.* United States, 164 U. S., 190, where the Government is held entitled to recover money which had been paid out by its officers through mistake of law.

This case is followed in the case of U. S. *vs.* Saunders, 79 Fed., 407 (C. C. A.), where in a suit brought by a marshal against the United States, the latter set off sums theretofore paid to the marshal by mistake; and in United States *vs.* Dempsey, 104 Fed., 199, where the money was paid by error of law.

The fourth count of the declaration contains the following allegation:

> "The plaintiff says that as a matter of fact the said horse had been used by its owner, the defendant, and then entrusted to a private soldier of the United States to be returned to the stable, and that it was not the duty of the said soldier, as a soldier, to take the said horse to the stable, and that the said horse became frightened and broke away from the said soldier and was killed, and that the said horse was only worth the sum of one hundred dollars, and that as matter of law the said horse was not lost in the military service of the plaintiff, or under any exigency or necessity of said service, and was not lost without fault or negligence on the part of the defendant, and that the defendant was guilty of negligence in entrusting the said horse to the said soldier, and that the said auditor was mistaken in fact when he found the said horse was of the value of one hundred and fifty dollars, and was mistaken in law when he found the said horse was lost in the military service of the said United States and without fault or negligence on the part of the defendant."

The second and third counts contain substantially the same averments.

It therefore appears that the horse was not worth the sum which was paid and was not lost in the military service and without the fault or negligence of the claimant. This certainly states a good cause of action under

any view of the case, and if these averments can be sustained by the evidence the Government is entitled to recover.

It is therefore respectfully submitted that the judgment of the court below should be reversed.

DANIEL W. BAKER,
United States Attorney.

JESSE C. ADKINS,
Special Assistant United States Attorney.

Court of Appeals, District of Columbia.

APRIL TERM, 1909.

No. 1995.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

CHARLES F. MASON.

BRIEF FOR APPELLEE.

GEORGE B. DAVIS,
LEWIS W. CALL,
Attorneys for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C.

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STATEMENT OF FACTS.

In 1889 the appellee, hereinafter referred to as the defendant, was an assistant surgeon in the United States Army, stationed at Fort Washakie, Wyoming, and while there he suffered the loss of a horse, valued by him at $150.00.

2. Under the provisions of the act of March 3, 1885 (23 Stat. L., 350), the defendant presented a claim for the value of this horse, which was allowed by the Auditor for the War Department, and the defendant was duly paid the sum of $150.00, and accepted the same in full satisfaction of said claim.

3. Within a year from the date of this settlement the Comptroller of the Treasury, on his own motion, revised the

decision of the Auditor and found a balance in favor of the appellant for $150.00. The defendant has always refused to pay the alleged indebtedness, and the appellant brought this action; to which defendant demurred, denying the right of the Comptroller to reopen the claim after it had been settled and paid.

4. The demurrers of the defendant to the declaration and the several amendments thereto were sustained and judgment given for the defendant, as shown by the record. From this judgment the appellant appealed to this court.

ARGUMENT.

The act of March 3, 1885 (23 Stat. L., 350), authorizes the proper accounting officers of the Treasury to examine into, ascertain, and determine the value of private property of officers and soldiers lost or destroyed in the military service, under the circumstances specified therein; that is, *inter alia,* where the loss or destruction was "without fault or negligence on the part of the claimant." The act directs the amount of such loss so determined to be paid to the claimant in full satisfaction of his claim, and provides, *inter alia,* that "any claim which shall be presented and acted on under this act shall be held as finally determined and shall never thereafter be reopened or considered."

The appellant contends that the act of August 3, 1894 (28 Stat. L., 206), conferring on the Comptroller authority to revise on his own motion the settlement by the Auditor of "public accounts" certified by the Auditor, modified or repealed the act of 1885, so far as to confer upon him the authority to reopen a claim settled under that act within one year after such settlement, and to revise and reverse the decision of the Auditor in the premises, whether or not the amount awarded had been received and accepted by the claimant in full satisfaction of his claim.

The contrary, however, was held in United States *v.* Olmsted, 106 Fed. Rep., 286, in which case the court said:

> "The act of March 3, 1885, under which defendant filed his claim, among other things provided that an officer can recover from the Government the value of his private property 'when such loss or destruction was without fault or negligence on the part of the claimant.' That further provides 'that any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered.' The two clauses quoted have never been repealed. But the United States Attorney relies upon the act of Congress of July 31, 1894, which is still in force. * * * *After the allowance and payment of the claim,* I see no provision of this statute that controls the situation."

The same position was taken in U. S. *v.* Wilcox, 118 Fed. Rep., 729; and see remarks in U. S. *v.* Johnson, 124 U. S., 236-254.

2. It is well established that repeals by implication are not favored, and that a later statute, general in its scope, will not be construed as an implied repeal of an earlier special statute unless there be a clear intention to do so. "While a later statute might repeal a former one without express language to that effect, yet it cannot be supposed that the legislature in framing a general statute intended to repeal a special statute made necessary by local circumstances (1 L. R. A., 363). See 26 Am. & Eng. Ency. of Law (2d edition), 739, where this "canon of statutory construction" is stated in broad terms and with numerous citations in support of the same. Both statutes are to be construed together, the special operating as an exception to the general. (See, also, Bishop on Written Laws, sec. 156, and particularly Townsend *v.* Little, 109 U. S., 504.)

It is submitted that this rule is applicable to the statute under consideration, and that where a claim has been "acted

on" under the act of March 3, 1885, the Comptroller cannot reopen it under the provisions of the act of July 31, 1894. There are special reasons of policy why claims of officers under the act of March 3, 1885, should be settled promptly and finally, and Congress, in view of these reasons, has provided that "any claim which shall be presented and acted on under authority of this act *shall be held as finally determined, and shall never thereafter be reopened or considered.*"

3. The provision of the act of August 31, 1894 (*supra*), refers to "balances which may from time to time be certified by the auditors * * * *upon the settlement of public accounts,*" which it is provided shall be final and conclusive upon the executive branch of the Government, subject to the revisions provided for—*inter alia*, the revision of the same within a year by the Comptroller upon his own motion. It will be observed that this authority has reference to the settlement of "*accounts,*" which term necessarily implies debit and credit items, while the matter in controversy is a one-sided transaction—*i. e.*, a claim for property lost in the military service. Under this view, independent of the doctrine regarding special and general statutes, it would appear that the provision relied on by the defendant in this case is in full force and effect.

4. Upon the allowance and payment of this claim by the Auditor it became one which, in the language of the proviso, had been "presented and acted on under this act," so that it cannot "thereafter be reopened or considered." It became a claim which the Auditor, in the exercise of quasi-judicial powers, and not in the performance of the usual duties of an accounting officer, had allowed.

> "It presented a clear case for the action of a judge, an arbitrator, or jurors, to settle and determine the damages. There was nothing whatever in it that pertained to the duty of an auditing or accounting officer. * * *

> "Can it be doubted that the same facts and circumstances occurring between two individuals would be held to constitute an arbitrament and award?"
> Carmick *v.* U. S., 2 Ct. Cls., 126, 140.

On the settlement of this claim by the Auditor and the payment thereof it became *res judicata*—a judgment by a court of the parties' own choice. It became, therefore, conclusive as to the merits of the controversy, and could only be reopened, if at all, for fraud or other matter which would defeat an award.

It is submitted that the record does not contain any allegation of fraud, or even any allegation of mistake of fact or law, within the proper meaning of these terms. The allegation as to the finding of the Auditor as to facts and law—that the facts and law were otherwise than as found by him, and that he was mistaken in fact and in law—are but allegation of *errors of judgment* by the Auditor; in fact, of just such matters as are not to be *reopened or reconsidered.*

An award will not be set aside because the arbitrators have drawn incorrect conclusions from the facts before them (Jolly *v.* Blanchard, 1 Wash. C. C., 252; Kliene *v.* Catara, 2 Gall., 61; Denny *v.* Brown, Fed. Cases, 3805).

Everything is to be presumed and every reasonable intendment made in favor of an award (Karthens *v.* Ferrer, 1 Pet., 222).

An award will not be set aside or impeached for overvaluation in the absence of fraud, accident, or mistake (Burchell *v.* Marsh, 58 U. S., 344; Hartford Fire Ins. Co. *v.* Bonner, 15 U. S. Appeals, 134).

An award may be set aside if the mistake is of such a nature, so affecting the principle upon which an award is based, that, if it had been seasonably known and disclosed to the arbitrators—if the truth had been known to them and understood by them—they would probably have come to a different result (Frick *v.* County Christian, 1 Fed., 250).

The mistake must be of some fact, inadvertently assumed

and believed, which can now be shown not to have been as assumed (Boston Power Co. *v.* Gray, 6 Met., 131). And see the similar cases of U. S. *v.* Olmsted, 106 Fed., 286; U. S. *v.* Wilcox, 118 Fed., 729.

5. It has been repeatedly held that where, in satisfaction of a claim against the United States, a sum smaller than that demanded is allowed and accepted, the claimant thereafter cannot sue for any balances which he may imagine to be due him. In other words, by his acceptance of the $150.00 allowed him by the Auditor, the defendant is precluded from reopening the claim. It is submitted that the converse of this proposition is true, and that by payment of this sum the settlement is conclusive as to appellant. To reach any other conclusion would result in assuming the inconsistent position of having one rule for the claimant and another for the Government.

It is therefore submitted that the present case is governed by the principles set forth in the following opinions:

> "The processes of the Treasury Department are all *ex parte* and not finally consummated beyond recall until a check has been issued upon a warrant duly signed by the Secretary of the Treasury."
>
> Ridgway *v.* U. S., 18 Ct. Cls., 707, 714.
> McKnight's case, 13 Ct. Cls., 292, 301.
> McKnight's case, 98 U. S., 185.
> Chorpenning *v.* U. S., 12 Ct. Cls., 140, 147 (94 U. S., 397).
> Kellogg *v.* U. S., 1 Ct. Cls., 310.
> Mullet *v.* U. S., 21 Ct. Cls., 487.

> "Parties may adjust their own disputes, and when they do so voluntarily and understandingly, no appeal lies to the courts to review their mutual decision."
>
> Sweeney *v.* U. S., 84 U. S., 75.

> "It is always in the power of parties to compromise their difficulties. One way of doing this is by arbitrators, mutually chosen, but from such submission neither party is at liberty to withdraw after the award

> is made. The condition of the Government creditor is better than this, for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt of it, if he chooses to take it, with a proper protest. This protest is necessary to inform the Government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the Court of Claims. If with knowledge and under these circumstances the money is paid, there can be no just cause of complaint on either side, and the status of the parties is not affected by anything which transpired before the commission."
>
> U. S. *v.* Justice, 81 U. S., 549.

6. In United States *v.* Olmsted (106 Fed. Rep., 286), a case on all fours with this one, the court expressly held that the proviso relied on by the defendant herein has never been repealed, and that "after the allowance and payment of the claim" it could not be reopened by the Comptroller.

The case of U. S. *v.* Wilcox (118 Fed. Rep., 729) is also on all fours with the one under consideration. In that case the Circuit Court of Appeals, Ninth Circuit, in affirming the judgment of the lower court in favor of the defendant, said, *inter alia:*

> "Whatever might be held if it was made to appear that the claim in question had been presented, or acted on, or paid under a mistake of fact or law, or by reason of any fraud practiced against the Government, certainly, in the absence of any such showing, the express declaration of Congress that any claim which shall be presented and acted on under authority of the act shall be held as finally determined, and shall never thereafter be reopened or considered, is conclusive against any further action on the part of the Government.
>
> "Similar views were expressed by the Circuit Court for the Southern District of Iowa in the case of U. S. *v.* Olmsted, 106 Fed., 286."

In view of the positive language of the proviso in question, which in both of these decisions was held to be in full force and effect, it is submitted that *nothing short of fraud* in procuring the settlement would justify the reopening of the same. Certainly an error of judgment by the Auditor, not due to fraud of the defendant, would not warrant such action.

It is submitted that the proper time for the Comptroller to review this claim was before the payment to the defendant. After the check was issued and paid the act of 1885 barred all revision.

GEO. B. DAVIS,
LEWIS W. CALL,
Attorneys for Appellee.